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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 371

GAYNOR NEWS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 153-160) is reported at 197 F. 2d 719. The findings of fact, conclusions of law, and order of the Board (R. 9-57) are reported at 93 NLRB 299.

JURISDICTION

The decree of the Court of Appeals (R. 161-164) was entered on July 8, 1952. The petition for a writ of certiorari was filed on October 2, 1952. The jurisdiction of this Court is invoked under 28 U.

S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Under Section 8 (a) (3) of the National Labor Relations Act, it is unlawful for an employer "by discrimination in regard to . . . any term or condition of employment to encourage . . . membership in any labor organization." The primary question presented is whether an employer who grants a retroactive wage increase and vacation payments to employees who are union members and withholds such benefits from non-members violates Section 8 (a) (3) in the absence of independent proof that his action was intended to, or did in fact, encourage union membership.

2. Whether, following a charge filed by a single employee alleging that as a non-member of a Union he was denied benefits granted union members only, the Board may properly issue a complaint alleging that the employer had discriminated against the charging employee and all others similarly situated.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are set forth in the Appendix, *infra,* pp. 19-23.

STATEMENT

A. The Board's findings and conclusions

The Board held that petitioner violated Section 8 (a) (1), (2), and (3) of the Act by refusing to

accord to its non-union employees certain benefits which it granted to its union employees, and by executing and maintaining an agreement which contained an illegal union-security clause. The essential facts upon which the Board's conclusions rest are not in dispute (R. 99-100, 103), and may be summarized as follows:

1. *Petitioner's discriminatory treatment of its non-union employees*

Petitioner and the Union[1] have had collective bargaining agreements covering delivery department employees[2] since 1943 (R. 30). On January 2, 1946, petitioner and the Union executed a closed shop contract which embraced members of the Union who were then or would thereafter be employed by petitioner (R. 30, 121-126). Although, under the closed shop clause, petitioner was required to employ only members of the Union, under exceptional circumstances petitioner could and did hire persons who were not union members and who did not thereafter become union members (R. 82-83, 122-123).[3] This agreement also provided, *inter alia,* for specified wages and paid vacations based on the number of days worked during the previous year (R. 123-124). The original termination date of the contract, October 16, 1947, was

[1] Newspaper and Mail Deliverers' Union of New York and Vicinity.

[2] These are the only employees involved in this proceeding.

[3] The contract permitted employment of non-union personnel if the Union could not supply labor from its own ranks (R. 122-123).

extended by a supplementary agreement dated August 22, 1946, for a period of one year to October 16, 1948 (R. 118-121).

On October 9, 1947, petitioner and the Union executed a second supplementary agreement which provided, *inter alia,* that in the event the parties negotiated a new contract, the wage rates set therein would be applicable retroactively for three months in lieu of the wages provided in the old contract (R. 128-129). On October 25, 1948, petitioner and the Union entered into a new agreement, effective that day, which provided, *inter alia,* for increased wage and vacation benefits (R. 114-117).

As provided in the supplementary agreement of October 9, 1947, petitioner was obligated to apply the wage increase of the new agreement retroactively through the last three months of the old agreement. Hence, in November, 1948, petitioner paid *to its union employees only* a sum of money constituting the difference between the old and the newly increased wage rates for the three months' period. It failed and refused to pay the same differential to any of its non-union employees (R. 10-12, 32, 99, 103, 83-86).

In addition, petitioner awarded retroactively the increased vacation benefits provided in the contract of October 25, 1948 to union employees only; it failed and refused to make similar payments to any of the non-union employees (R. 10-12, 32-33, 100, 103, 77-83). This action was taken despite the fact that none of the contracts provided for retro-

active application of the new vacation benefits (R. 35-36, 78-79).

Upon these facts the Board concluded that petitioner, by making retroactive wage and vacation benefit payments to union employees because of their membership in the Union while failing and refusing to make such payments to non-union employees because of their lack of membership in the Union, discriminated in regard to the terms and conditions of employment of the non-union employees so as to encourage membership in the Union, thereby violating Section 8 (a) (3) of the Act. The Board concluded further that petitioner, by according union employees preferred treatment, illegally assisted and supported the Union in violation of Section 8 (a) (2) of the Act (R. 40-46, 10-12).

2. *The illegal union security clause in the October 25, 1948, contract*

The October 25, 1948, contract contained a union security clause which required all new employees hired by petitioner to become members of the Union thirty days following the beginning of their employment (R. 115-116).[4] The Union had never been authorized in a Board-conducted election pursuant to Sections 9 (e) and 8 (a) (3) to negotiate a union security agreement.[5] The Board found, on

[4] This contract was in effect at the time of the hearing in July 1950 (R. 71-72).

[5] During all times pertinent herein, Sections 8 (a) (3) and 9 (e) of the Act provided that union-security agreements could legally be executed only by unions which had been authorized to do so pursuant to a Board-conducted election.

these facts, that by entering into an agreement with the Union on October 25, 1948, which contained an unauthorized union security provision, and by continuing this contract in effect, petitioner had interfered with its employees' right to refrain from union activities, in violation of Section 8 (a) (1). The Board found further that by executing the illegal union security agreement petitioner had lent its assistance and support to the Union in recruiting and maintaining its membership in violation of Section 8 (a) (2) of the Act (R. 40-46, 10, n. 4).

3. *The validity of the complaint issued by the Board*

The original charge initiating these proceedings, filed and served on February 3, 1949, by Sheldon Loner, one of the non-union employees, alleged that petitioner in violation of Section 8 (a) (1) and (3) had discriminated against Loner in refusing to make his October 1948 wage increase retroactive and to pay him vacation benefits because of his non-membership in the Union (R. 93-94). An amended charge filed by Loner on June 13, 1950, repeated those allegations and also alleged that petitioner had violated Section 8 (a) (1) and (2) by executing on October 25, 1948, a contract containing an illegal union security clause (R. 95-96). The Board's complaint, issued June 13, 1950, repeated the allegations in the amended charge and added the allegation that petitioner had refused to make the retroactive wage and vacation payments

not only to Loner but to all employees similarly situated (R. 97-101). The Board rejected petitioner's contention that under the six month period of limitations contained in Section 10 (b) of the Act, the complaint could properly include only the violations alleged in the original charge, relying on its holding in *Cathey Lumber Co.*, 86 NLRB 157, 162-163,[6] "that a complaint may lawfully enlarge upon a charge if such additional unfair labor practices were committed no longer than 6 months prior to the filing and service of such charge" (R. 29).

B. The Board's order

The Board's order (R. 12-15), as enforced by the court below, prohibits petitioner from encouraging membership in any union by discriminating in regard to hire, tenure, terms and conditions of employment. The order also requires petitioner to stop performing or giving effect to its contract of October 25, 1948, with the Union, and to refrain from executing or enforcing any agreement with the Union which contains a union security clause unless such agreement has been authorized as provided by the Act.

Affirmatively, the order requires petitioner to reimburse the non-union employees for any loss of pay which they suffered because of petitioner's discrimination, and to post notices, in the usual

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[6] Enforced, 185 F. 2d 1021 (C. A. 5), vacated on other grounds, 189 F. 2d 428, and see *Stokely Foods, Inc.* v. *National Labor Relations Board*, 193 F. 2d 736, 737-738 (C. A. 5).

form, stating that it will comply with the Board's order.[7]

C. The decision of the court below

Except for the modification noted (n. 7, this page), the court below enforced the order of the Board (R. 161-164).

1. *The validity of the complaint.* Noting that the complaint expanded upon the charge to include all the non-union employees discriminated against, the court observed that "This addition certainly could not prejudice the employer's preparation of his case or mislead him as to what exactly he was being charged with" (R. 154-155). The court further stated that the allegation in the complaint that this discrimination, characterized in the charge as a violation of Section 8 (a) (1) and (3), also violated Section 8(a) (2), "was only a change in legal theory and not in the nature of the offense charged" (R. 155). With respect to the union security contract, the court held that since the contract was still in force at the time of the amended charge alleging its illegality, "the six months' limitation period of Section 10 (b) had not even begun to operate" (*ibid.*).

2. *The merits.* The granting of benefits to union members and the withholding of benefits from non-

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[7] The order originally entered by the Board also required petitioner to refrain from recognizing the Union until the Union had been certified by the Board as representative of the employees (R. 14). This portion of the Order was set aside by the court below, one judge dissenting (R. 159-160), and the Board has not sought review of this aspect of the case.

members, the court held, was "discriminatory conduct . . . inherently conducive to increased union membership" in that it increased "the number of workers who would like to join and/or their quantum of desire" (R. 156). Rejecting petitioner's contention that the non-union employees, who were ineligible for membership under the Union's rules, had already tried to join the Union and hence were not "encouraged" to do so by the discrimination against them, the court held that "these rejected applicants have been and will continue to be 'encouraged' by the discriminatory benefits in their desire for membership . . . If and when the barriers are let down, among the new and successful applicants will almost surely be large groups of workers previously 'encouraged' by the employer's illegal discrimination" (R. 156-157). The court noted that here, unlike *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), the Union "represented the majority of employees and was the exclusive bargaining agent for the plant" so that it could not legally bargain "for special benefits to union members only" (R. 156).

The court also agreed with the Board that the union security contract was palpably invalid because it had not been authorized by the special election then required by the Act (R. 158); petitioner has not sought review of this aspect of the case.

ARGUMENT

1. Petitioner contends that it "did not discriminate against Loner [and the other non-union members] *because* he was not a union member," that "it felt that Loner was not entitled to the particular benefit involved," and that "union membership as such is not even remotely involved" (Pet., p. 23). In thus attacking the concurrent findings of the trial examiner, the Board, and the court below that petitioner discriminated among its employees on the basis of union membership, petitioner raises only an issue of fact which merits no review by this Court. *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491.

2. The holding of the court below that petitioner unlawfully encouraged union membership by withholding wage and vacation benefits from all employees who were not members of the Union is manifestly correct, and, contrary to petitioner's contention, is not in conflict with the decisions of any other Courts of Appeals.

Petitioner, conceding that the granting of favored treatment to union members "ordinarily" results in "encouragement . . . of union membership" (Pet., p. 20), argues that in this case the discrimination was not unlawful because it was not intended to encourage union membership and did not in fact have that result. Contrary to petitioner's contention, however, decisions of this Court and of the Courts of Appeals establish that an employer who discriminates among his em-

ployees on the basis of union membership violates Section 8 (a) (3), notwithstanding the absence of evidence that he intended to, or did in fact, encourage or discourage union membership.

This Court in *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 805, held that the employer had discriminatorily discharged certain employees in violation of the Act even though the employer did not intend thereby to discourage union membership. An unbroken line of decisions by the various Courts of Appeals likewise establish that where an employer in fact discriminates on the basis of union membership, the fact that he has no desire or intent to encourage or discourage membership is no defense to his violation of the statute.[8]

In the cases cited by petitioner (Pet., pp. 21-22) inquiry into the employer's motivation was material only as an aid in determining the ultimate fact admitted here,—that union affiliation or lack of it prompted the discrimination. Because an employer may discriminate for any reason other than union or concerted activities, the employer's motive becomes a critical ancillary issue whenever he con-

[8] See, *e.g.*, *National Labor Relations Board* v. *Don Juan Co.*, 185 F. 2d 393, 394 (C. A. 2); *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C. A. 6); *National Labor Relations Board* v. *Oertel Brewing Company*, 197 F. 2d 59, 62 (C. A. 6); *National Labor Relations Board* v. *Fry Roofing Co.*, 193 F. 2d 324, 327 (C. A. 9); *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C. A. 9); *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853-854 (C. A. 8); *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435, 440 (C. A. 7).

tends that his conduct was motivated by factors other than union activity. In such cases, proof of the employer's motive is necessary to ascertain the real cause of the discrimination,—whether for union activity or some other reason. Once this factual question is resolved, the alleged violation is either established or falls. In the instant case, the fact ordinarily contested is established—petitioner withheld benefits from certain employees *because* they were not union members—and under the authorities cited above, its purpose in so discriminating is immaterial.[9]

Petitioner's contention that proof of actual encouragement is an essential element of the Board's case is likewise foreclosed by this Court's holding in the *Republic Aviation* case, 324 U. S., at 798, 800. This Court there expressly rejected the contention "that there must be evidence before the Board to show that * * * the employers interfered with and discouraged union organization" (p. 798); it held that the required proof "does not go beyond the necessity for the production of evidential facts * * * and compel evidence as to the results which may flow from such facts" (p. 800).

A wealth of court of appeals authority likewise holds that proof of actual encouragement of membership is unnecessary, and that, as the House

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[9] Petitioner, although still denying that it intended to encourage membership in the Union, is not seeking review here of the Board's holding, approved by the court below, that petitioner unlawfully assisted and supported the Union by granting it an unlawful union security clause.

Committee stated in reporting favorably on the bill which became the Wagner Act,

> agreements more favorable to the majority than to the minority are impossible, for under section 8 (3) any discrimination is outlawed which *tends* to "encourage or discourage membership in any labor organization". [H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21, emphasis supplied.] [10]

Moreover, petitioner's suggestion that proof of encouragement of membership should be elicited from each employee denied benefits (Pet., p. 29) is not only contrary to this Court's recognition that employe testimony is by no means a reliable gauge of the effectiveness of an employer's discriminatory conduct (*National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 231; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588), but overlooks the fact that petitioner's discriminatory conduct may well have encouraged present union members to retain their membership, and may also have encouraged utter strangers to this proceeding to seek admission to the Union.

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[10] See, *e.g.*, *National Labor Relations Board* v. *Engelhorn & Sons*, 134 F. 2d 553, 557 (C. A. 3); *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 595-596 (C. A. 9); *National Labor Relations Board* v. *Brezner Tanning Co.*, 141 F. 2d 62 (C. A. 1); *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 49 (C. A. 9), certiorari denied, 324 U. S. 877; *National Labor Relations Board* v. *Vail Mfg. Co.*, 158 F. 2d 664, 666-667 (C. A. 7), certiorari denied, 331 U. S. 835; *National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. 2d 933, 937 (C. A. 2); *General Motors Corp.*, 59 NLRB 1143, 1145, enforced, 150 F. 2d 201 (C. A. 3).

Petitioner claims conflict between the decision of the court below and decisions of the Courts of Appeals for the Third and Eighth Circuits, including one decision now pending on writ of certiorari [11] (Pet., pp. 6-8, 12-18). Although the decisions cited contain dicta undeniably inconsistent with the approach followed by the court below, analysis reveals that the decisions themselves are distinguishable on their facts.

Although the facts in *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), closely resemble those in the instant case, the significant difference, as the court below observed (R. 155-156), is that in *Reliable* the union did not represent a majority of the employees (187 F. 2d, at 549, 551), and hence, unlike the Union here, was not the statutory collective bargaining representative. Consequently, in *Reliable,* the court could find that the disparate wage payments were required by a valid contract, and hence were not discriminatory within the meaning of the Act. In the instant case, however, the Union as representative of all the employees could not validly contract for benefits to union members only (*Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203-204; *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248, 255; see also, the House Report quoted *supra,* p. 13), and the contract therefore cannot, as in *Reliable,* serve as a

[11] *National Labor Relations Board* v. *International Brotherhood, etc., Local 41,* 196 F. 2d 1 (C. A. 8), certiorari granted, No. 301, this Term.

defense to the employer's discriminatory wage payments.[12] By finding the employer in *Reliable* innocent of illegal discrimination, the Court of Appeals for the Third Circuit disposed of that case on grounds not here involved. The court's alternative holding in that case that proof of encouragement was lacking was not essential to its decision and hence does not pose a conflict which warrants review of the instant case.

In *National Labor Relations Board* v. *Del E. Webb Construction Co.*, 196 F. 2d 702 (C. A. 8), the court found that the discharge resulted from the normal application of a seniority rule and not from the employee's non-membership in the union. The *Webb* case thus falls in the category described at pp. 11-12, *supra*, where the primary issue is whether union affiliation or lack of it prompted the discrimination; it is distinguishable here where there is no question that the granting or withholding of benefits turned on an employee's union membership or lack thereof.

Likewise inapposite is *National Labor Relations Board* v. *International Brotherhood, etc., Local 41*, 196 F. 2d 1 (C. A. 8), certiorari granted, No. 301, this Term. In that case, as well as in the case to

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[12] Petitioner, conceding as it must that in this case, unlike *Reliable*, the Union was the statutory bargaining representative of all the employees, states that "it is not clear what the effect of such a distinction might be" (Pet., p. 15). Succinctly stated, the effect of the distinction, under this Court's decisions in the *Steele* and *Wallace* cases, is to stamp the contract on which petitioner now relies as invalid.

be heard as a companion thereto,[13] the employees discriminated against were members of the Union but were discriminated against because they failed to maintain membership in good standing. The issue in those cases, therefore, is whether the term "membership" in Section 8 (a) (3) is limited to "adhesion to membership" or embraces "membership in good standing." See our petition for certiorari in No. 301, pp. 9-11. In the instant case, in diametric contrast to those cases, the employees were discriminated against because they were not members of the Union. Consequently, the discrimination tended to encourage membership even in the narrow "adhesion" concept applied by the Eighth Circuit, and the issue as to which this Court has granted certiorari is not present here.

3. The holding of the court below that the Board in its complaint is not limited to the unfair labor practices alleged in the charge is in accord with a long line of decisions of the several courts of appeals.[14] No conflict of decisions on this point is claimed and none exists. Petitioner, conceding

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[13] *Radio Officers' Union* v. *National Labor Relations Board*, 196 F. 2d 960 (C. A. 2), certiorari granted, No. 230, this Term.

[14] See *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 14-16 (C. A. 1); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 903-904 (C. A. 3); *National Labor Relations Board* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *National Labor Relations Board* v. *Westex Boot & Shoe Co.*, 190 F. 2d 12, 13-14 (C. A. 5); *Cathey Lumber Co.* v. *National Labor Relations Board*, 185 F. 2d 1021 (C. A. 5), enforcing 86 NLRB 157, 159-163; *Stokely Foods, Inc.* v. *National Labor Relations Board*, 193 F. 2d 736, 737-738 (C. A. 5); *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C. A. 7); *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10).

that the Board has power to "enlarge upon the unfair labor practices set out in the original charge" (Pet., p. 28), contends that this power does not permit the Board to include in the complaint discriminatees who have not themselves invoked the Board's aid in their behalf. Cf. Section 16 (b) of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act of 1947, 61 Stat. 87, 29 U. S. C., 216 (b). This precise contention was rejected in the *Cathey Lumber* case, *supra,* p. 16; moreover, it overlooks the fact that the Board acts in the public interest rather than in vindication of private rights (*Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 265-269), and that the purpose of the charge is merely to set "in motion the machinery of an inquiry" (*National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9, 18) and to permit the Board to "enter intelligently upon the exercise of its exploratory powers" (*Consumers Power Co.* v. *National Labor Relations Board,* 113 F. 2d 38, 42 (C. A. 6)).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:* * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a),

of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based

upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, includ-

ing the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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